SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 819.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN MORGAN AND ALFRED Y. MORGAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

1 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN MORGAN AND ALFRED Y. MORGAN, defendants.
} Petition for writ of error.

The United States of America, feeling aggrieved by the order of this court entered herein on the 20th day of September, 1910, ordering and adjudging that a motion in arrest of judgment be granted, comes now by Henry A. Wise, its attorney, and petitions said court for an order allowing said United States of America to prosecute a writ of error to the Supreme Court of the United States in accordance with the act of Congress approved March 2, 1907, and your petitioner will ever pray.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Attorney for the United States.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of an order and judgment which is in the Circuit Court, before you, or some of you, in the matter of an order granting a motion in arrest of judgment herein, a manifest error hath happened, to the great damage of the said United States of America, as is said, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in its behalf, do command you that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court at the city of Washington, together with this writ, so that you have the same at the said place before the judges aforesaid, on the 15th day of November, 1910, that the record and proceedings aforesaid being inspected the said United States Supreme Court may cause further to be done therein to correct their error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States this 18th day of October, one thousand nine hundred and ten.

[SEAL.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States for the Southern District of New York in the Second Circuit.

3 The foregoing writ is hereby allowed.

LEARNED HAND,
United States District Judge, holding Circuit Court.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America for the Southern District of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the pages numbered from one to forty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of United States of America, plaintiff in error, *vs.* John Morgan and Alfred Y. Morgan, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the second circuit, this sixth day of December, in the year of our Lord one thousand nine hundred and ten, and of the independence of the United States the one hundred and thirty-fifth.

[SEAL.] JNO. A. SHIELDS, *Clerk.*

4 (Indorsed.)

Form No. 336. Orig. U. S. Circuit Court, Southern District of New York. United States of America versus John Morgan and Alfred Y. Morgan. Petition for writ of error, and writ of error. Henry A. Wise, United States Attorney, Attorney for U. S.

Due service of a copy of the within is hereby admitted.

New York, Oct. 18, 1910. Alexander Train, Otto G. Foelker, attorney for defs.

To Otto G. Foelker & Alexander Train, attorneys for defendants, 38 Park Row.

5 *Indictment.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the city of New York, within and for the district and circuit aforesaid, on the first Monday of March, in the year of our Lord one thousand nine hundred and ten, and continued by adjournment to and including the 29th day of April, in the year of our Lord one thousand nine hundred and ten.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The grand jurors of the United States of America, in and for the district and circuit aforesaid, on their oath present that heretofore, on October 21, 1908, at the Southern District of New York,

and within the jurisdiction of this court, John Morgan and Alfred Y. Morgan, associated together and doing business under the firm name and style of John Morgan, did ship and deliver for shipment from the city of New York, State of New York, to the city of Newark, State of New Jersey, via Wells Fargo Express Company, consigned to W. R. Scudder, a certain article of food contained in a bottle labeled, among other things, as follows:

"Imperial Spring Water,
John Morgan,
343 W. 39th Street, New York;"

which said label on the bottle in which said food was shipped, as aforesaid, regarding the substance or ingredients contained therein,
was false and misleading and labeled so as to deceive and mis-
6 lead the purchaser, in that said label would indicate that the contents of said bottle was a spring water, whereas in truth and in fact the contents of said bottle was not a spring water, but was filtered Croton water to which artificial mineral-water salts had been added; against the peace of the United States and their dignity and contrary to the form of the statute of the same in such case made and provided.

HENRY A. WISE,
U. S. Attorney.

(Endorsed:) U. S. Circuit Court. The United States of America vs. John Morgan and Alfred Y. Morgan. Indictment. Misbranded. Pure food and drugs, act of June 30th, 1906. Henry A. Wise, U. S. attorney. A true bill. Jos. T. Lee, foreman. U. S. Circuit Court, Southern District, N. Y., filed Apr. 29, 1910, John A. Shields, clerk.

1910. May 23. Deft. John Morgan pleads not guilty. Paroled.
May 23. Deft. A. Y. Morgan pleads not guilty. Paroled.
June 13. Deft. demurs & moves to quash indictment.
Demurrer overruled. Motion denied. Exception.
Deft. pleads not guilty. Defts. tried and convicted.
Motion in arrest of judgment.
Sept. 20. Filed order denying motion for a new trial.
Sept. 20. Filed order granting motion in arrest of judgment.
Oct. 11. Filed assignment of errors.
Oct. 18. Filed citation.
Oct. 18. Filed writ of error (petition for).

7 United States Circuit Court, Southern District of New York.
Before Hon. George C. Holt, J., and a jury.

UNITED STATES
vs.
JOHN MORGAN AND ALFRED Y. MORGAN.

NEW YORK, *June 13, 1910.*

Appearances:
Henry A. Wise, U. S. attorney, for Government; Robert Stephenson, assistant U. S. attorney, of counsel.

Alexander Thain, attorney for defendants; Otto G. Foelker, of counsel.

A jury is impaneled and sworn.

Mr. Stephenson opened the case for the Government.

WILLIAM R. SCUDDER, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. STEPHENSON:

Q. Mr. Scudder, where do you live?

A. Newark, New Jersey.

Q. What is your business?

A. Druggist.

Q. A little louder. What is your business?

A. Druggist.

Q. In the month of October, 1908, did you order some Imperial Spring Water from the firm of John Morgan?

A. Yes.

Q. And was that water delivered to you?

A. Yes, sir.

Mr. THAIN. A little louder.

The WITNESS. Yes, sir.

Q. That was the firm of John Morgan, 343 West Thirty-ninth Street?

A. Yes, sir.

Q. And by what carrier was that delivered to you in New Jersey?

A. As I remember, one of the express companies.

8 Q. Do you know whether it was the Wells, Fargo Company?

A. I am not sure; it was either the Wells, Fargo or the Adams.

Q. Do you remember how you received it; did you receive any invoice covering that water?

A. Yes, sir.

Q. I show you that invoice, and ask you if that is the invoice you received [showing witness]?

A. Yes, sir.

Q. And did you pay for that water c. o. d.?

A. Beg your pardon?

Q. I say, did you pay for that water c. o. d.?

A. Either c. o. d. or by check; I don't remember now.

Q. Look at that invoice and probably you can refresh your recollection from that [showing witness].

A. Yes; that was paid by express charges; yes.

Q. And look at this receipt. Can you refresh your recollection as to what express company it came by?

A. Wells, Fargo Express.

Q. That is the shipping receipt?

A. Yes, sir; for the expressage.

Mr. STEPHENSON. I offer in evidence the receipt.

(Two papers received in evidence and marked "Government's Exhibits 1 and 2," and read to the jury.)

Q. Now, I show you that piece of paper, and ask if that was the tag on the box bearing the shipment?

A. Yes, sir; that was the tag.

Mr. STEPHENSON. I offer this in evidence.

Mr. THAIN. There are some marks on these papers.

Mr. STEPHENSON. I omit any of the marks that have been added since. I will omit any of the lead-pencil memorandums.

Mr. THAIN. I want to know only who put them there, when, and why?

(Tag above referred to by Mr. Stephenson received in evidence and marked "Government's Exhibit 3," and read to the jury.)

Q. Now, was this one of the bottles that you received in that shipment [showing bottle to witness]?

A. Very much like the package, sir.

Mr. STEPHENSON. I offer this bottle in evidence. I will omit this label put on here and this one on here [indicating].

Mr. THAIN. I don't wish it. If it is to go in, I only want to know who put it there and why.

(Bottle above referred to by Mr. Stephenson received in evidence and marked "Government's Exhibit 4.")

Mr. STEPHENSON. Your witness.

Cross-examination by Mr. THAIN:

Q. Mr. Scudder, there appears on this bottle between the word "Imperial" and "Imperial," etc., below some hieroglyphics that I translate "F. and D., 784;" did you put that on?

A. No, sir; I did not.

Q. Do you know who put it on?

A. No, sir; I can not say that I do.

Q. Was that on the bottle when you received it?

A. No, sir.

Q. I think you said you did not know where you got this bottle from?

A. I said it looked very much like it; I can not say that was the exact bottle.

Q. No. Now, there is across the cap of this cork a label.

Q. Did you put that there?

A. I did not; no.

Q. There is nothing, then, about this bottle that has been produced here that will enable you to say that you ever saw it before until it was handed right in here now and shown you?

A. It resembles it; that is all I can say; I can not say it was the exact bottle.

Q. Do you mean to say that was the exact bottle that came to you?

A. No, sir.

10 Q. So far as you are able to tell these twelve men under oath, you never saw that bottle until when?

A. As far as I can tell this jury, that is the identical bottle we received.

Q. You can not say positively that you ever saw that bottle until within five minutes ago?

A. The lawyer asks——

Q. Never mind what he asked you. Until five minutes ago, you were not prepared to say that you ever saw the bottle before?

A. It resembled the package that I received.

Q. It resembles it?

A. Yes, sir.

Q. That is all you can say?

A. Yes, sir; I won't say positively it was the same bottle.

Q. That is what I want to find out.

A. All right.

Q. If you ever saw the bottle before did it have on the letters F. and D. 784?

A. How is that?

Q. If you ever saw it before, if you have any recollection on the subject at all, did it have on——

A. Not that label; no; it had Imperial Spring Water on it.

Q. I thought you said you did not know who put on this other?

A. I don't know who put that on; no.

Q. And you don't know who put on this label across the top?

A. I can not say; probably the Government put it on.

Q. I don't want any probabilities about it.

A. I presume Mr. Duff put them on there; he is the collector of the United States.

Q. What makes you presume so?

A. Because he came and ordered those from me.

Q. Did he order them from you before you ordered them from Morgan?

A. How is that?

Q. Did he order them from you before you ordered them from Morgan?

A. That package; no.

Q. He did not?

A. No.

Q. How did you happen to send to Morgan for this particular package, if you think this is one of the packages?

11 A. As I told you, it was ordered by Mr. Duff.

Q. You say this package was ordered by Mr. Duff and then you ordered it from Morgan?

A. Yes, sir.

Q. How long before Duff ordered the package from you before you ordered it from Morgan?

A. That was ordered in 1908, was it not?

Q. Now, don't ask any questions of me. It is all news to me. I want to know how long it was before you ordered it from Morgan when Duff ordered it from you?

A. It may have been a month or it may have been two months.

Q. At all events, Duff ordered it from you preceding your order to Morgan?

A. He asked me if I had that stock. I said no, and he asked me to order it for him.

Q. He wanted you to order it for him?

A. Yes, sir.

Q. Let us see who Duff is. You say he is the Government inspector?

A. Yes, sir.

Q. How do you know?

A. I didn't know until afterwards that he was.

Q. And who told you that he was?

A. I presume Mr. Duff mentioned the fact after he received it.

Q. Do you know what office he holds?

A. Not exactly; no.

Q. Well, approximately?

A. He is the inspector, as far as I know.

Q. Inspector for the Agricultural Department?

A. Yes, sir.

Mr. STEPHENSON. We admit that.

Q. Has Mr. Duff ever ordered goods from you before?

A. Before that?

Q. Yes.

A. I think he had.

Q. Where was he when he ordered them?

A. I think he came to my store and ordered them.

Q. Can not you tell us a little better than that?

A. That has been quite some time.

Q. A year and a half ago?

A. He might have written an order to me.

12 Q. But you don't know?

A. I don't remember now.

Q. Well, now, had Duff ordered any goods from you before he gave you the order for these?

A. I don't remember now.

Q. Has he ordered since?

A. Yes, sir.

Q. Have you ever testified in any case before?

A. No; this is my first appearance.

Redirect examination by Mr. STEPHENSON:

Q. Did you ever receive any Imperial Spring Water from anyone?

Mr. THAIN. Objected to as incompetent, irrelevant, and immaterial.

The COURT. Objection overruled.

Mr. THAIN. Exception.

Q. Anyone from the firm of John Morgan; did you ever receive any bottles similar to this from anyone else except the firm of John Morgan?

A. No.

Q. And were the bottles which you sold to Mr. Duff sitting right here——

A. Yes, sir.

Q. Part of the shipment which he testified you received from John Morgan? Were bottles of spring water which you sold to Mr. Duff part of the shipment which you received from John Morgan?

A. Yes, sir.

Recross-examination by Mr. THAIN:

Q. Do you know of any other Imperial Spring Water than such as is sold by Morgan?

A. Not that I know of.

Q. Never heard of it before?

A. No.

Q. Nor have you heard of it since?

A. No.

Q. So that if anyone came into your store to buy Imperial Spring Water you would not be misled into selling anything else but Morgan's?

A. That is all I know.

13 JAMES C. DUFF, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. STEPHENSON:

Q. Mr. Duff, what is your occupation?

A. United States food and drug inspector.

Q. How long have you been such inspector?

A. A little over three years; a trifle over three years.

Q. I show you Government's Exhibit 4 and ask you if you have ever seen that before [showing witness]?

A. Yes.

Q. Did you put that label on top there?

A. I did.

Q. Where did you get that bottle?

A. I purchased it from Mr. Scudder.

Q. The witness who has just preceded you?

A. Yes, sir.

Q. Was that in Newark, New Jersey?

A. Newark, New Jersey.

Cross-examination by Mr. THAIN:

Q. You heard Mr. Scudder's testimony, did you?

A. I did.

Q. Had you ever seen Imperial Spring Water before you got that from Mr. Scudder?

A. No.

Q. You went to Mr. Scudder's place and asked him to send to Morgan for it, did you?

A. As far as I can recall now, I asked if he had Imperial Spring Water, as I wanted to purchase some.

Q. Well, you didn't want to buy it, did you?

A. Yes.

Q. You did not want any, though, did you?

A. Yes, sir; for a sample.

Q. What you wanted was to get a sample so that you could prosecute Mr. Morgan?

A. No.

Q. Had you ever seen a bottle of Imperial Spring Water before you saw the bottle that is before this court and jury?

A. Not to my recollection.

Q. And you just happened to stroll into Mr. Scudder's store and ask him for a bottle of Imperial Spring Water; is that it?

A. No; I went there.

Q. What is that?

A. I did not happen to stroll in.

14 Q. You went there on purpose?

A. Decidedly so.

Q. How did you know that he had any?

A. I didn't know.

Q. And he told you that he had not any?

A. At that time I didn't know.

Q. Now, what did you tell him besides?

A. Well, I cannot recall the distinct conversation a year and a half ago. I wished to purchase the sample of Imperial Spring Water, and he stated that he didn't have it.

Q. Well, what else took place?

A. Well, I cannot distinctly recall at this time; it was a year and a half ago.

Q. Didn't you then and there ask Mr. Scudder to send to Mr. Morgan and get some?

A. I don't recall that I did.

Q. How long a time elapsed between the day you went in there and asked him if he had any Imperial Spring Water and the time you went in and got the bottle?

A. I don't recall.

Q. Was it a month?

A. It might have been.

Q. Didn't you keep a memorandum of some kind of your investigations for the Government in this little affair?

A. Oh, yes.

Q. Well, now, look at your book and see if you can tell when you went in there. After you first asked this man who didn't have it, and then you asked him to send to New York and get it over in New Jersey?

A. I purchased it of Mr. Scudder on October the 27th.

Q. Now, will your books tell you, or will any memorandum tell you, or will your recollection serve you, to find out how long a time it was before that you went into this place and found it was not there for sale, and when you asked to have it brought over from New York?

A. My best recollection is about a month, six weeks, or two months.

Q. So that your present recollection is that it was about a month, six weeks, or two months that you were engaged in getting this
15 sample over from New York City to Newark, New Jersey?

A. Oh, no; you asked me how long a period elapsed, and I told you that, but I was engaged in other work besides that.

Q. What you mean is you did not devote your entire time to working on this charge against Morgan; is that it—you were attending to somebody else?

A. I was attending to my duties.

Q. How do you account for it that you allowed a month or six weeks or two months to elapse when you found that the water was not there for sale and asking that it be ordered and sent over to New Jersey?

A. I believe I was called down to Washington on some duties.

Q. Well, that don't help us out any?

A. As far as I recall now, I was called down to Washington.

Q. Well, it was not on this business, this bottle of Morgan's that you went down to Washington?

A. Not especially on that; I don't think so.

Q. Now, when you got this bottle from Mr. Scudder, what did you do with it?

A. I got several bottles.

Q. Now, we will talk about this bottle.

A. Well, I sealed this bottle—put a seal on: I sealed it when I purchased it.

Q. This paper over the end?

A. Yes, sir.

Q. You would not call a seal to be this paper—that would not be a misbranding?

A. I am not permitted to give any opinion on misbranding.

Q. Now, this other paper that is on the front of this paper—F. & D., 784—did you put that on?

A. Yes, sir.

Q. When?

A. I cannot say.

Q. When did you put this label over the top you call a seal?

A. When I purchased the sample.

Q. Right there in the shop?

A. No.

16 Q. What I want to find out is where you put it on?

A. In my office, in the United States appraisers stores.

Q. Where is that?

A. Christopher and Greenwich Streets.

Q. In this city?

A. Yes, sir.

Q. Well, let us see if we can get at it. You went into Mr. Scudder's store and you found he had not an article of that kind in his shop—if I make any misstatement, stop me—you asked him to get some from Mr. Morgan; he sent and got it; this bottle was produced or purchased and you put this marking on it and brought it right back to New York?

A. Pardon me; there were several bottles in that package.

Q. Have you any several bottles here? Have we any more than this bottle right here [indicating bottle]?

A. No.

Q. Then we will talk about what you have got here. Now, you brought that bottle back right over the river, put it in your shop in New York, did you?

A. Yes, sir.

Q. You knew where Morgan's place of business was here in New York?

A. By the telephone directory, yes, sir; I never was there.

Q. And you knew that you could get a bottle of that water by going up to his establishment without going to Scudder's and taking it over to Newark?

A. Yes, sir.

Q. When did you take this back to this place in Greenwich Street?

A. Immediately after I purchased it.

Q. Well, the same day?

A. As far as I recall; yes.

Q. Had you any other business with Scudder that day than the getting of this bottle?

A. Not that I know of or recall of.

By Mr. STEPHENSON:

Q. Mr. Duff, in addition to your duties to going around collecting samples, do you usually make it a point to collect samples from those people who have violated the law?

Mr. THAIN. That is objected to.

The COURT. Objection sustained.

17 CHARLES H. PATE, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. STEPHENSON:

Q. What is your occupation?

A. Bookkeeper for John Morgan.

Q. Where are you employed?

A. With Mr. John Morgan, 343 West 39th Street.

Q. John Morgan, the defendant here?

A. Yes, sir.

Q. Who else is in that firm?

A. Alfred Y. Morgan.

Q. His son?
A. Yes, sir.
Q. How large an establishment is it?
Mr. THAIN. Objected to as immaterial as to whether it is a large or a small establishment.
The COURT. Objection sustained.
Q. What are your duties there?
A. Bookkeeper, cashier, keep accounts of all bills and all payments out of money
Q. Now, I show you this check and ask you have you ever seen that before [showing witness a check]?
A. Well, I have never seen the check before, but that is my handwriting on the back of it—that is, I don't recall it.
Q. But that is your handwriting?
A. Yes, sir.
Q. There is the stamp of John Morgan on there; did you put that on?
A. Yes, sir.
Q. Did you write the names of Morgan?
A. Yes, sir.
Q. What did you do with it?
A. Deposited it in the bank.
Q. To whose account?
A. John and Alfred Y. Morgan.
Q. Where did you get this check from? Look at it and see if you can tell [showing].
A. Wells, Fargo & Company.
Q. And it was in payment of what?
A. Well, I have received so many checks that I cannot say what check was in payment of it. It says here in payment of Mr. Scudder.
Mr. STEPHENSON. I offer this check in evidence.
(Check above referred to received in evidence and marked "Government's Exhibit 5," and read to the jury.)

18 HARRY E. BRAMLEY, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. STEPHENSON:

Q. Mr. Bramley, what is your occupation?
A. Sanitary inspector.
Q. Are you connected with any firm?
A. Connected with Lederle Laboratories.
Q. Did you ever see the defendant, John Morgan, before?
A. Yes, sir.
Q. When and where did you first see him?
A. About in the month of June, 1909.
Q. Where?
A. In the office of the laboratories.
Q. What did he say and what did you say?

Mr. THAIN. I object to that. He might have talked politics. Let us get down to this $2.50.

Q. Now, what was the conversation between you and him with reference to the Imperial Spring Water at that time?

A. Mr. Morgan came to the office to tell us that he had received duplicates of sample that had been taken by the Agricultural Department that had been shipped to his office; that he wanted us to come for the samples to his office and bring them over to the laboratory and have them analyzed; he wanted me to go over there personally and accompany the package to our office in order that we might state definitely that we had analyzed that particular package which had been delivered to us.

Q. Which the food and drug inspector had purchased; is that what you mean?

A. Well——

Q. What did he say?

A. He said that samples had been collected by the Department of Agriculture and these were duplicates of those samples.

Q. And did you get a sample of the water from him?

A. We got six samples, six bottles.

19 Q. And among those six did you get one of the samples purchased by the inspector of the Department of Agriculture?

A. I understood that was—no, I beg to correct that—it was three samples, duplicates of what had been collected by the Department of Agriculture.

Q. That is what Mr. Morgan told you?

A. Yes, sir.

Q. And did you go up to Mr. Morgan's place, at 343 West 39th Street?

A. I did.

Q. In company with him, did you make an inspection of his place?

A. Yes, sir.

Q. And what did you find as to the system by which Imperial Spring Water was manufactured there?

Mr. THAIN. Objected to.

The COURT. Objection overruled.

Mr. THAIN. Exception.

The WITNESS. You want me to tell what the result of my inspection was?

Q. Yes, sir; what you saw and what occurred there.

A. I went over the plant with Mr. Morgan and from observation and from information, this is what I found—the report I made, if you will permit me to read it.

Q. Yes.

A. First, the water is passed through a very fine sand filter, consisting of a bed of sand about 18 inches in depth laid in the bottom of a wooden tank lined with tinned copper. Second, from the sand filter the water passes into large wooden tanks containing beds of

gravel and charcoal several feet in depth. Third, the water passes from these tanks into a holding tank. Fourth, from the holding tank the water is received into the dosing tank. Here the mineral salts are added. Fifth, from the dosing tank the mineralized water flows through a pipe to an earthen jar having a capacity of about 5 gallons.

Sixth, from the earthen jar the water is pumped into the mixer
20 where it is charged with carbonic acid gas. Seventh, from the mixer, the water is forced to bottling machine, where the bottles are filled and capped. Eighth, the carbonic acid gas is manufactured on the premises. Ninth, the bottles are washed on a rotating machine which cleanses both the outside and the inside of the bottles. Tenth, cold water only is used in the washing process and the water used is from the Croton supply. I was further informed by Mr. Morgan that the water used for bottling was from the Croton supply.

Q. That is, it was drawn out of the faucet on the premises, was it?

A. Yes, sir.

Q. Now, after making that inspection did you confer with Mr. Lederle?

A. Yes, sir.

Q. And I ask you is this a letter to John Morgan which Mr. Lederle drafted?

Mr. THAIN. I object to what Mr. Lederle drafted.

The COURT. That is immaterial. If he remembers he saw that and Mr. Morgan answered it, it might be material. The objection is overruled.

Mr. THAIN. Exception.

A. (No answer.)

Cross-examination by Mr. THAIN:

Q. Mr. Bramley, you have not read all of the report that you have before you?

A. I have read all of my report, sir.

Q. Well, don't you see there that it says "Is not contaminated" water?

A. That is contained in the report.

Mr. STEPHENSON. I offer the report in evidence.

(Report above referred to received in evidence and marked "Government's Exhibit 6" and read to the jury.)

Q. What do you know, if anything, of Croton water?

A. In what respect, sir?

21 Q. Well, as to whether it is a spring water or not, or known as a spring water?

A. I have been on the Croton water shed and a number of times, sir.

Q. Yes.

A. Some of the water supplies of New York City is from spring sources, and other parts of it is from surface sources.

Q. When you say surface sources, you mean the rainfall?

A. Yes, sir; rain, during a rainfall.

Q. Now, which is the purer of the two?

Mr. STEPHENSON. Objected to as having no relevancy to this case.

Q. Plus the rainfall; am I right about that? Croton sources are springs?

A. To some extent; yes, sir.

Q. Plus the rainfall running into the streams?

A. Into the lakes and streams.

Q. Now, I will ask you again, which is the purer water, spring water or rain water?

Mr. STEPHENSON. Objected to as having nothing to do with this case.

The COURT. Objection overruled.

The WITNESS. Well, if you mean by which is the purer, which is nearer to what is known chemically as water, rain water would be the purer.

Q. You might just for the moment—what is water, anyhow, what is it known as in chemistry?

Mr. STEPHENSON. Oh, I object to that.

The COURT. Yes; objection sustained.

Mr. THAIN. Exception.

By Mr. STEPHENSON:

Q. As to this spring water and Croton water, which is the most expensive?

Mr. THAIN. Objected to as quite immaterial.

The COURT. Objection overruled.

Mr. THAIN. Exception.

22 Q. Which is the most expensive?

A. Well, for the citizens of New York—I do not know what it costs in the way of taxes for water rents; I cannot make a comparison between the two.

Q. Well, I mean if you bought a bottle of spring water on the market and a bottle of Croton water, which would cost the most?

Mr. THAIN. Objected to.

Mr. STEPHENSON. All right; that is all.

HENRY B. MACHEN, a witness called on behalf of the Government, being duly sworn, testified as follows:

Direct examination by Mr. STEPHENSON:

Q. What is your occupation?

A. Civil engineer.

Q. You are what?

A. Civil engineer.

Q. You are connected with the water department of New York City?

A. Yes, sir.

Q. Are you familiar with the sources of supply of Croton water?

A. Yes, sir.

Q. Will you please explain to the jury the sources of that supply?

A. On the Croton water shed there are about 360 square miles of territory the drainage of which all runs down from various reservoirs and streams to the main Croton Dam or main Croton Lake, out of which we have two acqueducts which bring the water to New York City. All the rain that falls into that land in there [indicating] either evaporates or comes to this city, and we get about 45 per cent of the rainfall that is available. All the rain that comes down either runs down from the surface into the reservoirs or evaporates or goes into the ground and comes out of the dam below.

Cross-examination by Mr. THAIN:

Q. I didn't catch what your name was?

A. Machen.

Q. Well, you know that the water shed of the Croton River
23 is filled with springs, do you not?

A. Why, the water comes out of side hills all along.

Q. And that runs into this stream and is piped down to the city of New York?

A. Runs into the reservoirs; yes.

Q. Now, this that you have spoken of as surface water, or which my friend puts in your mouth, rather, was a rainfall?

A. Yes, sir.

Q. Falling down and running into the stream. Am I right as to that?

A. Yes, sir.

Q. Now, you know that this whole, how many——

A. 360 square miles.

Q. Yes; that these three hundred square miles is policed so that nothing contaminating can get into the water; is that so?

A. We police it, but I won't say that nothing gets in.

Q. Well, that is the purpose, is it not?

A. Yes, sir.

Q. And under the law, which you as an engineer in the department are enforcing?

A. Yes, sir.

Q. Buildings are not to be allowed to be erected within quite a distance of those streams?

A. Yes, sir.

Q. Stables are not allowed to be erected within how many feet, 250 or——

A. Something like that.

Q. You don't know?

A. I don't know the exact figure; I think it is 100 feet.

Q. Don't you know it is 250 feet?

A. I don't know.

Q. You don't know whether it is 250 or 25?

A. I know that they are not supposed to be near the streams; I would not give any exact figure.

Q. And you know it is policed for that purpose, see that nothing contaminating gets into the stream?

A. Yes, sir.

Q. Only you are in doubt about the number of feet?

A. Well, we have twelve policemen for 360 square miles.

Q. How long have you been in the department?

A. Five years.

24 Q. You have been up on the water shed yourself?

A. Many times.

Q. Who is at the head of that department now, this particular branch that you are serving under?

A. I have charge of the maintenance of the water supply; that includes the water sheds down to the city here.

Redirect examination by Mr. STEPHENSON:

Q. If you purchased some water in the market labeled spring water, would you think you were getting Croton water?

Mr. THAIN. That is objected to.

The COURT. Objection sustained.

Mr. STEPHENSON. The Government rests.

Mr. THAIN. Well, we are through, too. The defendant rests.

If your honor please, I would like to move for a direction of a verdict.

The COURT. I think it is a question for the jury.

Mr. THAIN. Exception.

Mr. Foelker thinks I should also move to quash and demur and everything that will reserve our rights.

The COURT. Yes; the motion is denied and I give you an exception.

Mr. THAIN. Yes; exception.

Mr. Thain summed up for the defendant.

Mr. Stephenson summed up for the Government.

25 *Charge.*

The COURT (Holt, J.). The simple question here is, gentlemen, is this a misleading label. Spring water in the ordinary acceptation of the term is understood to mean water taken from a spring. There are various kinds of such water on the market. In this case it must be admitted that if this was water that had passed through a purifying process it would be a perfectly pure and wholesome water, but the Government claims it is not spring water, and therefore the label upon it in that respect is misleading.

Now, it is true that this pure-food act is intended and its important purpose is to prevent unwholesome and adulterated articles being sold to the public as food or drink. In the case of drugs something may be sold which is not properly labeled. It is also to prevent a misbranding of articles so that a person who looks at a label on an article will find one or see one which truthfully described the thing.

It is for you to say, under all the evidence—I shall not refer to it at all—whether this label is a misbranding within the meaning of the act.

You are bound before you should convict the defendant to find that he is guilty beyond a reasonable doubt. If you have a reasonable doubt as to his guilt, you should acquit him; and, on the other hand, if you have not, you should convict him.

Mr. THAIN. May I take an exception to so much of your honor's charge that a person purchasing this water would be entitled to expect to get a water taken immediately from the spring?

The COURT. No; I don't say that. It is for the jury to say that, whether it is something as branded. That is the point.

26 Mr. THAIN. Exception.

The jury then retired.

The jury returned to court and rendered a verdict to the following effect:

"That the label is misleading and the defendant is guilty."

Mr. FOELKER. The defendants move for a new trial on the ground that the verdict is against the evidence, against the law, and upon all the exceptions taken during the trial.

The COURT. Decision reserved.

Mr. FOELKER. The defendants also move that judgment be arrested.

The COURT. Decision reserved.

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27 EXHIBIT 1.

NEW YORK, *October 21, 1908.*

M. R. W. Scudder, to John Morgan, Dr.

Pure carbonated waters, seltzers, vichy, carbonic.

343–347 West 39th St., N. Y.

To 3 doz. mineral waters, at $ 96¢	$2.88
Ex. chgs	.90
	$3.78

Paid, 10/22/08. Boland.

EXHIBIT 2.

NEW YORK, *Oct. 22, 1908.*

M. W. Scudder, to Wells, Fargo & Co. Express, Dr.

For freight on box from N. Y. $3.75

Expense (advance charges).

(Received payment for the proprietors.) Boland.

28 EXHIBIT 3.

From
John Morgan,

343 to 347 W. 39th Street, N. Y.

W. R. Scudder,
95 Belleville Ave.,
Newark, N. J.

EXHIBIT 4.

A bottle containing this label:

Imperial

Spring trade-mark registered water.

This Bottle
Should be Laid on its
Side in a Cool Place.

A Perfect Diluent
for Wines & Liquors

John Morgan,
343 W. 39th St.,
New York.

See that the corks are branded
"John Morgan."

29 EXHIBIT 5.

A check from Wells, Fargo & Company for $2.88, endorsed John Morgan and Alfred Y. Morgan.

The foregoing case is hereby ordered settled and placed on file. Nov. 25, 1910.

GEO. C. HOLT,
U. S. Judge.

Consented to.
HENRY A. WISE,
U. S. Attorney.
ALEXANDER THAIN,
Attorneys for Defendants.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Nov. 26, 1910. John A Shields, clerk.

30 UNITED STATES
vs.
JOHN MORGAN AND ALFRED Y. MORGAN. } 2–463. Information.

Appearances: Robt. Stephenson, asst. U. S. atty. Alexander Thain for deft.

Defendant demurs and moves to quash.

Defendant overruled, and motion to quash denied. Exception.

Defendants plead not guilty.

Jurors sworn:

1. Archibald P. Black.
2. Louis Congdon.
3. John Craig.
4. Chas. E. Hall.
5. Cecil K. Leavitt.
6. Wm. R. Ellis.
7. Harris A. Dunn.
8. Joseph O. Downes.
9. Fred H. Bidwell.
10. Elmer Butler.
11. Philip Fitzgerald.
12. Lawrence Dunham.

Mr. Stephenson opens case for Government.

Evidence prosecution:

William R. Scudder, sworn.
James C. Duff, "
Chas. H. Pape, "
Harry E. Bramley, "
Henry B. Machen, "

Government rests. Defendants rest*s*. Evidence closed.

Mr. Thain moves to dismiss information.

Motion denied. Exception.

Mr. Thain sums up. Mr. Stephenson sums up.

The charge is thereupon delivered by the court to the jury, who retire in charge of an officer duly qualified to attend them, and
31 upon their return say they find the label misleading and defendants guilty as charged.

Motions to set aside verdict for new trial and in arrest of judgment.

C. A. V.

32 *Opinion.*

United States Circuit Court, Southern District of New York.

UNITED STATES
v.
JOHN MORGAN ET AL.

Henry A. Wise and Robert Stephenson for the United States.
Alexander Thain and Otto G. Foelker for defendants.

HOLT, J.

These are motions by the defendant for a new trial and in arrest of judgment. The defendants were convicted, under the act of June 30, 1906, commonly called the pure food act, for shipping

from New York to New Jersey misbranded bottled water. The bottles were labeled "Imperial Spring Water." They contained water which was originally ordinary Croton water, drawn from a pipe on the defendants' premises in New York City. This water was first passed through a fine sand filter, then through beds of gravel and charcoal, then a small quantity of mineral salts was added, it was charged with carbonic acid gas, and put in thoroughly clean bottles. This water when sold was pure and wholesome. A food and drug inspector, appointed by and acting under the Department of Agriculture, whose office was in New York City, went to a druggist at Newark, New Jersey, and asked for Imperial Spring Water. The druggist had none. The inspector thereupon asked the druggist to order some for him. He did so. In compliance with such
33 order the defendant shipped half a dozen bottles so labeled from New York City to the druggist at Newark, New Jersey. He thereupon sold them to the inspector, who brought them back to New York and reported the case to the district attorney. The defendants were thereupon indicted for such shipment. There was no evidence on the trial that any notice was given to the defendants of the examination of said water by or under the direction of the Bureau of Chemistry in the Department of Agriculture, or that any opportunity was given to them to be heard on the question whether the pure food act had been violated.

The defendants claim, on these motions, first, that the evidence showed that the water sold was spring water, and therefore that the bottles were not misbranded. The proof showed that ordinary Croton water, like the water of any fresh-water lake or river, is partly spring and partly rain and surface water. The water as treated by the defendants was a thoroughly filtered water, with a little mineral salts and carbonic acid gas added, which made it more sparkling, and, to many people, more attractive. It was perhaps as expensive to produce and as pure and wholesome as spring water. But it was not what is commonly understood by the public as spring water—that is, water taken directly from a natural spring. The label therefore was misleading and the bottles misbranded. The object of the pure food act is not only to protect the public from unwholesome food and drink, but to require that any article of food, drink, or medicine sold shall be correctly described by its label.

The defendants also claim that no judgment should be entered in this case because there is no evidence that they ever made any other shipment of such water in interstate commerce, and the evidence shows that the shipment on which the indictment was based
34 was secretly induced by a Government detective in order to create a basis for a criminal charge. There is no evidence that the defendants ever before sold or shipped water outside of New York *York* City. The inspector who ordered the water at Newark had his office in New York. His only apparent object in going to Newark to order this water was to secretly lure the defendants into an act which would enable him to make a criminal charge against

them. This was a perfectly wholesome water, and if there was no other justification for the inspector's proceeding than appears in the evidence, I think his course of action was one of unnecessary zeal. If there were no bottles to be found in other States which had been voluntarily shipped there by the defendants, whatever public evil might result from the sale of such water in New York City might wisely, in my opinion, have been left to be dealt with by the State authorities. The pure food act is a beneficial act; and it will be a matter of regret if the inspectors of the Department of Agriculture arouse hostility to it by excessive zeal to institute trivial prosecutions. But there may have been valid reasons for the course which was taken which did not appear on the trial; and in any event, I am not willing to hold that because some criticism may perhaps be made on the manner in which the proof was obtained, the proof itself was invalid or insufficient.

The important question on these motions is whether it was necessary for the indictment to allege and for the Government to prove that notice was given to the defendants by the agents of the Department of Agriculture of the examination of the samples obtained of the water, and an opportunity given them to be heard on the question whether the law had been violated.

Sections 3, 4, and 5 of the pure food act are as follows:

35 "SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

"SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid, and if it appears

that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

"SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

The claim that the indictment was invalid on its face because it did not allege that notice of the examination and opportunity to be heard was given to the defendants is, I think, untenable. There is obviously at least one case in which a prosecution is authorized when no preliminary investigation has been had by officers of the
36 Department of Agriculture. The 5th section provides that it shall be the duty of the district attorney to prosecute whenever any State health officer presents satisfactory evidence of any violations of the act. Moreover, the first and second sections, making it a misdemeanor to manufacture in the Territories or District of Columbia, or to ship in interstate commerce, adulterated or misbranded foods or drugs, are general in their terms. The act prohibited constitutes the misdemeanor. There is no direct reference in them to the subsequent sections providing for the notice to the owner of the samples and the opportunity to be heard; and in my opinion the district attorney can institute prosecutions under those sections, upon adequate evidence, without any preliminary investigation or action by the officers of the Department of Agriculture. But under the provisions of section 4 of the act, whenever an investigation is first instituted by the food and drug inspectors or other agents of the Department of Agriculture or of its Bureau of Chemistry, and an examination of specimens of foods or drugs had for the purpose of determining whether they have been adulterated or misbranded, notice of the examination and an opportunity to be heard must have been given to the party from whom the sample was obtained. In my opinion a compliance with this section is a prerequisite to a prosecution in all cases in which the matter is brought before the district attorney for prosecution by the agents of the Department of Agriculture. Proof of such notice and opportunity to be heard before the indictment is therefore material in all such prosecutions; and of course all material facts which are necessary to sustain a conviction

must be alleged in the indictment. The result is that although an indictment under the pure food act is not demurrable because it contains no allegation of such notice and opportunity to be heard, since such prosecutions can be maintained by the district attorney
37 without the intervention of the officers of the Department of Agriculture, such allegations and proof are necessary in all cases where the prosecution is instigated by such officers; and if it appears by evidence on the trial that the case is such, no conviction can be had in the absence of such allegation and proof. In this case, the investigation and prosecution were due to such officers. I think therefore that the indictment should have alleged and the evidence for the Government established that such notice and opportunity to be heard were given to the defendants and that, in the absence of such allegation and proof, the motion in arrest of judgment should be granted. The motion for a new trial should be either withdrawn or denied. If granted a new trial would result in nothing, because, in my opinion, the indictment is fatally defective.

July 15, 1910.

G. C. H., *J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Jul. 16, 1910. John A. Shields, clerk.

38 *Order denying motion for new trial.*

At a stated term of the United States Circuit Court for the Southern District of New York held in and for the circuit and district aforesaid, at the United States courthouse and post-office building in the borough of Manhattan, city of New York, on the 20th day of September, in the year of our Lord one thousand nine hundred and ten.

Present: Honorable George C. Holt, district judge holding Circuit Court.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN MORGAN AND ALFRED Y. MORGAN, DEFENDANTS.

This case having duly come on for trial before this court and a jury, upon a plea of not guilty to the indictment herein, on the 13th day of June, 1910, and testimony having been duly introduced on the part of the United States, and the court having duly charged the jury, and the jury having thereafter duly returned a verdict of guilty against the defendants herein, and the defendants having thereupon moved the court for a new trial upon the ground that the verdict was against the law and upon all the exceptions taken during the trial, and due deliberation having been had,

Now, on motion of Henry A. Wise, United States attorney for the Southern District of New York, it is hereby

Ordered that said motion for a new trial herein be, and the same is hereby, denied, on the ground that no conviction can be had under the indictment.

GEO. C. HOLT, *Judge.*

39 (Endorsed:) Due service of a copy of the within is hereby admitted.

New York, Sep. 19, 1910.

OTTO G. FOELKER and
ALEXANDER THAIN,
Attorneys for Defendants.

U. S. Circuit Court, Southern District N. Y. Filed Sep. 20, 1910. John A. Shields, clerk.

40 At a stated term of the United States Circuit Court for the Southern District of New York, held in and for the circuit and district aforesaid at the United States courthouse and post-office building in the borough of Manhattan, city of New York, on the 20th day of September, in the year of our Lord one thousand nine hundred and ten.

Present: Honorable George C. Holt, district judge holding Circuit Court.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN MORGAN AND ALFRED Y. MORGAN, DEFENDANTS.

This case having duly come on for trial before this court and a jury, upon a plea of not guilty to the indictment herein, on the 13th day of June, 1910, and testimony having been duly introduced on the part of the United States, and the court having duly charged the jury, and the jury having thereafter duly returned a verdict of guilty against the defendants, and the defendants having thereupon made a motion to the court in arrest of judgment,

Now, upon reading the indictment herein filed in this court on the 29th day of April, 1910, and the plea to said indictment and the verdict of the jury herein, and due deliberation having been had, it is hereby

Ordered and adjudged that said motion in arrest of judg-
41 ment be, and the same is hereby, granted on the ground that the indictment herein is insufficient upon any construction of the food and drugs act of June 30, 1906.

GEO. C. HOLT, *J.*

(Endorsed:) Service of a copy of the within is hereby admitted. New York, September 10th, 1910.

OTTO G. FOELKER and
ALEX. THAIN,
Attorneys for Defendant.

U. S. Circuit Court, Southern District of N. Y. Filed Sep. 20, 1910. John A. Shields, clerk.

42 United States Circuit Court, Southern District of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JOHN MORGAN AND ALFRED Y. MORGAN, DEFENDANTS.

Assignment of errors.

Now comes the above named United States of America by its attorney, Henry A. Wise, and files the following assignment of errors upon which it will rely upon his prosecution upon the writ of error sued out by it in the above-entitled cause to review the order made and entered herein on the 20th day of September, 1910, ordering and adjudging that the motion to arrest judgment herein be granted on the ground that the indictment herein is insufficient upon any construction of the food and drugs act of June 30, 1906, as follows:

1. That said court erred in granting said motion in arrest of judgment.

2. That said court erred in adjudging that the said indictment was insufficient upon any construction of the food & drugs act of June 30, 1906.

3. That said court erred in its construction of the food & drugs act of June 30, 1906.

4. That said court erred in its decision arresting a judgment of conviction herein on the ground that the indictment herein
43 was insufficient and basing its decision upon a construction of the food & drugs act of June 30, 1906, upon which said indictment was founded.

And said United States of America, the plaintiff in error, prays that the order made and filed herein on the 20th day of September, 1910, ordering and adjudging that the motion herein in arrest of judgment be granted, for the errors aforesaid, and other errors in the record and proceedings herein, may be refused and altogether held for nothing, and that the said court be directed to enter an order ordering and adjudging that said motion in arrest of judgment be denied, and that said court proceed to sentence the defendants herein.

Dated, New York, October 18, 1910.

HENRY A. WISE,
Attorney for the United States,
Plaintiff in Error.

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Oct. 18, 1910. John A. Shields, clerk.

44 By the Honorable Learned Hand, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, holding Circuit Court.

To John Morgan and Alfred Y. Morgan, greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden at the city of Washington,

in the District of Columbia, on the 15th day of November, 1910, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein The United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the order and judgment in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the District and Circuit above named, this 18th day of October, in the year of our Lord one thousand nine hundred ten, and of the independence of the United States the one hundred and thirty.

LEARNED HAND,
Judge of the District Court of the
United States for the Southern District of New York,
in the Second Circuit, holding Circuit Court.

45 (Indorsed.)

Form No. 336. Original. U. S. Circuit Court, Southern District of New York. United States of America versus John Morgan and Alfred Y. Morgan. Citation. Henry A. Wise, United States attorney, attorney for U. S.

Due service of a copy of the within is hereby admitted.

New York, Oct. 18, 1910. Alexander Thain, Otto G. Foelker, attorneys for defendants.

To Otto G. Foelker and Alexander Thain, attorneys for defendants.

46 (Indorsed:) U. S. Circuit Court of Appeals, Second Circuit. United States of America, plff. in error, vs. John Morgan and Alfred Y. Morgan, defts. in error.

(Indorsement on cover:) File No. 22,440. S. New York, C. C. U. S. Term No. 819. The United States, plaintiff in error, vs. John Morgan and Alfred Y. Morgan. Filed December 9th, 1910. File No. 22440.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOHN MORGAN AND ALFRED Y. MORGAN. } No. 819.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The defendants, John Morgan and Alfred Y. Morgan, associated together and doing business under the firm name and style of John Morgan, were indicted in the Circuit Court of the United States for the Southern District of New York for shipping from the city of New York, in the State of New York, to the city of Newark, in the State of New Jersey, a bottle of water labeled: "Imperial Spring Water, John Morgan, 343 W. 39th Street, New York;" which label, it was alleged, was false and calculated to deceive and mislead the purchaser, in that it would indicate that the contents of said bottle was a spring water, whereas in truth and in fact the contents of said bottle was not a spring water, but was filtered Croton water, to which artificial mineral-water salts had been added.

A demurrer to the indictment was overruled, trial was had, and the defendants found guilty. A motion in arrest of judgment was filed, and—on the ground that the evidence at the trial showed that the investigation leading up to the prosecution had been instituted by the food and drug inspectors and other agents of the Department of Agriculture, and that the indictment failed to allege, and the proof to show, that there had been a compliance with section 4 of the pure-food act of June 30, 1906, in accordance with which it is claimed notice should have been given to the defendants of the result of an examination of the water by the Bureau of Chemistry of the Department of Agriculture, and an opportunity afforded them to be heard on the question whether the law had been violated by them—the motion in arrest of judgment was granted. From this action of the court the writ of error has been sued out under the criminal appeals act.

In accordance with the provisions of that act, requiring cases thereunder to be diligently prosecuted and giving them precedence, the Solicitor General moves the court to advance the case on the docket for hearing during the October term, 1911.

Notice of this motion has been served upon counsel for the defendant in error and proof of service filed with the clerk.

FREDERICK W. LEHMANN,
Solicitor General.

APRIL, 1911.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JOHN MORGAN AND ALFRED Y. MORGAN. } No. 463.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

THE CASE.

The defendants, who are engaged in New York City in the business of preparing, bottling, and selling water for table use, were indicted April 29, 1910, for a violation of the food and drugs act of 1906 in shipping from New York to New Jersey a bottle of water labeled "Imperial Spring Water," which labeling was false and misleading in that the bottle contained not spring water but merely Croton water to which artificial mineral salts had been added. (Rec., 2, 3.) They were convicted October 18, 1910. (Rec., 18.)

At the trial it appeared that in October, 1908, Duff, a United States food and drugs inspector,

whose duties included that of collecting samples of foods and drugs for the purpose of investigating violations of the act, bought from Scudder, a druggist in Newark, N. J., several bottles of this water. These bottles had been purchased—at Duff's request—by Scudder from the defendants and shipped by the latter from New York to Scudder's place of business. Duff took the bottles back to New York and reported to the United States attorney that there appeared to be a violation of the act. The latter thereupon laid the case before the grand jury, which returned the indictment in question. There was no evidence that any notice of the examination of the water or that any opportunity to be heard was given to the defendants by or under the direction of the Bureau of Chemistry in the Department of Agriculture.

After the verdict the defendants moved in arrest of judgment and the motion was granted by Judge Holt on the ground that in this case proof of such notice and opportunity to be heard was material to the prosecution and that, therefore, the indictment should have contained allegations of such notice and opportunity. It was said in the opinion, however, that such allegations are not necessary in all cases under the food and drugs act, for there is at least one case in which a prosecution is authorized when no preliminary investigation has been made by the Department of Agriculture, that is, where satisfactory evidence of a violation has

been presented to the United States attorney by a state health officer. But, the court said, wherever an investigation is first instituted by food and drug inspectors or other agents of the Department of Agriculture, and an examination of specimens of foods and drugs is had for the purpose of ascertaining the existence of violations, notice of the examination and an opportunity to be heard must have been given to the party from whom the sample was obtained; and since it appeared in this case that the investigation was first instituted by such an officer the indictment should have contained appropriate allegations of such notice and hearing, and such allegations should have been supported by proof of the trial.

The Government thereupon sued out this writ of error to review the order of the Circuit Court arresting judgment on the verdict.

ASSIGNMENTS OF ERROR.

Error is assigned in the following respects:

1. That the court below erred in its construction of the act of June 30, 1906, in holding that a notice of examination and an opportunity to be heard before the Secretary of Agriculture are prerequisites to a criminal prosecution in any case under the act.

2. The court erred in holding that in any case under the act the indictment should contain an allegation that notice of the examination and opportunity to be heard had been given.

ARGUMENT.

Jurisdiction is clear in this court under the act of March 2, 1907 (34 Stat. 1246), providing that the United States may take a writ of error from a district or circuit court directly to this court among other instances—

> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

Thus the only question here is the correctness of the construction given by the court below to the statute. Our proposition is that—

In no case is it a condition precedent to prosecution for a violation of the food and drugs act that an investigation or hearing be had in the Department of Agriculture.

In *Hale* v. *Henkel* (201 U. S. 43) this court held that a Federal grand jury possesses full inquisitorial power and may indict upon knowledge acquired either from their own observations or upon the evidence of witnesses called of their own motion before them, and even though no preliminary hearing be had before a committing magistrate.

The trial court properly held, therefore, that the district attorney could institute proceedings for a violation of sections 1 and 2 of the food and drugs act without a preliminary departmental investigation. But it is impossible to reconcile with this the holding that where such violation is called to the

district attorney's attention by an agent of the department such hearing is a prerequisite to indictment.

Restated, the court's position is that while the grand jury may lawfully investigate violations of the food and drugs act, and indict therefor, yet if it happens to call as a witness an employee of the Department of Agriculture having knowledge of the facts its jurisdiction is instantly suspended until that department has given the defendant a hearing and recommended a prosecution.

It must be conceded that there is no express language in the statute introducing this anomalous exception into the well-settled law of criminal procedure.

If it exists, it must be because the act as a whole, considering the evils intended to be redressed and the remedies provided, requires such construction.

An examination, therefore, of the entire act is in order. In substance it is as follows (34 Stat. 768):

> An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.
>
> Section 1 makes it a misdemeanor for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded within the meaning of the act; and the punishment provided is fine, imprisonment, or both.

Section 2 prohibits the introduction of any such adulterated or misbranded article into one State from another, and provides that whoever shall ship or deliver for shipment from one State to another, or receive in one State from another, and deliver in unbroken packages to another person any such article, or sell in one of the Territories or in the District of Columbia, or export to a foreign country any such article, shall also be guilty of a misdemeanor, subject to substantially the same punishment as is imposed in section 1.

Section 3. The Secretaries of the Treasury, of Agriculture, and of Commerce and Labor " shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs " manufactured or offered for sale in the District of Columbia or in a Territory, or offered for sale in unbroken packages in any State other than that of their manufacture, or received from or intended for shipment to a foreign country, or submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any port through which the product is offered for interstate commerce, or export, or import.

Section 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, for the purpose

of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

Section 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the

enforcement of the penalties as in such case herein provided.

Section 6 defines "drug" and "food," the latter term including articles used for drink.

Sections 7 and 8 define the terms "adulterated" and "misbranded," the latter including all articles the package or label of which shall bear any statement regarding such article or its ingredients which shall be false or misleading in any particular.

Section 9 provides that no dealer shall be prosecuted who can establish a guaranty signed by the wholesaler or manufacturer, from whom he purchased such articles, that they are not adulterated or misbranded within the act, in which event the guarantor is amenable to the prosecutions, fines, and other penalties that would otherwise have attached to the dealer.

Section 10 provides for the seizure and destruction of adulterated or misbranded articles of food or drug which are otherwise within the provisions of the act; that such seizures shall be by process of libel for condemnation, and the proceedings are to conform to those in admiralty, except that a jury trial on issues of fact may be demanded by either party.

Section 11 provides that the Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon the latter's request, samples of foods and drugs being imported into the United States, giving notice to the owners; and if it appears from examination

of such samples, the owner having the right to be heard, that the articles violate the law, they must be destroyed or sent out of the United States.

Section 12 contains certain definitions not pertinent here, while section 13 makes the act effective after January 1, 1907.

The object of this statute, as said by this court in *Hipolite Egg Co.* v. *United States* (220 U. S. 54), is to keep adulterated and misbranded articles out of the channels of interstate commerce, and this object is sought to be secured not only by personal penalties but through the condemnation of the impure or misbranded article itself. And for the purpose of securing an effective execution of the law the Department of Agriculture is specifically directed to collect and examine samples, and if they are adulterated or misbranded to ascertain the persons guilty of violating the law and to call all such violations to the attention of the proper district attorney for prosecution.

We submit that there is nothing in the statute or any of its sections which justifies the construction placed on it by the court below.

1. The departmental investigation and hearing do not constitute a means of defining any element of the crimes. They are defined by sections 1 and 2. The defendants' offense was putting a misbranded article of food into interstate commerce, and the crime was committed when the shipment was made. The manner of acquiring the evidence can make no change in the crime.

This is recognized in section 4, which declares that " if it appears that any of the provisions of the act have been violated " the facts shall be certified to the district attorney. Thus the test for prosecution and the definition of the accused's duties and rights with which the criminal courts are concerned are found in other sections of the act.

2. Uniformity of procedure does not require this construction. Quite to the contrary; for section 5 expressly directs the district attorney to proceed when satisfactory evidence is presented to him by a State officer, and, of course, without preliminary investigation by the Agricultural Department. And the court below held that the district attorney can institute proceedings upon adequate evidence without this investigation save in the one instance where the crime is called to his attention by an employee of the department.

3. Such preliminary hearing is not intended as an aid to the court.

The department makes no finding which is binding upon anyone; it ascertains no fact upon which jurisdiction depends; it fixes no right of either the Government or the accused.

It is only after it appears from an examination thereof that the article is misbranded that the person from whom it was obtained is given an opportunity to be heard, and if it appears that he has violated the act, the facts are certified to the district attorney with a sworn copy of the examination or analysis. But the finding of the Secretary

is not receivable in evidence, nor is the copy of the examination. The witnesses must be produced in the ordinary way, and either the grand or petit jury may take the contrary view.

Thus the principles applied by this court in *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (204 U. S. 426) have no weight here. The interstate commerce act was intended to secure reasonable rates and abolish discrimination in rates, and the instrumentality created to accomplish these purposes was a commission to hear complaints, to ascertain that rates were unreasonable and to fix reasonable rates in their stead, and to award reparation for excessive rates already collected; and it was provided that rates published by the carriers should be the only lawful rates until found unreasonable by the commission, and that in suits to recover excessive charges the commission's finding should be prima facie evidence of its truth. While the statute did not in terms abrogate the common law right to sue to recover excessive freight charges, that right, unless the suit were brought after action by the commission, was necessarily inconsistent with the scheme devised to remedy the wrongs of the shippers, and would have led to great confusion, besides being the prolific source of discriminations. Accordingly, the court held that it was repealed.

The only mandate of the food and drugs act is that articles be pure and truthfully branded; these are matters always within the control of the manu-

facturer. The lawfulness of his label depends only on its truth, not on any action of the Secretary of Agriculture. The latter can not make pure what is adulterated, nor make true what is false. Nor does the Secretary's finding prima facie establish the defendant s guilt.

4. Such construction is prejudicial to the accused and an invasion of his rights.

The departmental investigation neither adds to nor takes from the crime. At the trial, the only questions are whether the article is adulterated or misbranded, and whether the defendant is the guilty person. These facts must be proved by witnesses testifying of their own knowledge and subject to cross-examination by the defendant.

Under section 4 it is only when the officer in the Bureau of Chemistry finds from his examination that the article is adulterated or misbranded, and the Secretary finds that the party from whom the sample was obtained has violated the law in connection with such adulteration or misbranding, that the facts are certified to the district attorney.

Plainly the defendant's guilt can not be established either conclusively or prima facie by the mere production of certified copies of these findings of the Chemist and the Secretary. The defendant can not by such means be deprived of a jury trial and of the right to be confronted by the witnesses against him.

If these departmental findings are not admissible as in themselves tending to show the defendant's

guilt they should not be received for any purpose. To acquaint the jury with the fact that these two officers of the Government had reached the conclusion that the defendant was guilty could not fail to operate to his prejudice. If the departmental investigation is a condition prerequisite to indictment, proof that it was had is of course prerequisite to conviction. Such proof could not be given without its also appearing that the findings in the department were that the defendant was guilty. This consideration alone shows that the court below has not properly construed the act.

Of course, if the departmental findings are not received in evidence, they should not be averred in the indictment.

5. Pursued to its logical conclusion, this construction leads to absurd results.

(*a*) If the department officers should reach the erroneous conclusion that an article is not adulterated or misbranded, no hearing will be had, and the criminal is immune from prosecution.

(*b*) The statute directs the Secretary to certify the facts only when he finds the person from whom the sample was obtained is guilty. If that person in establishing his own innocence shows the guilt of another, the latter is immune from prosecution.

(*c*) Section 5 directs the district attorney to prosecute when a state officer furnishes satisfactory evidence of guilt. If a state officer furnish such evidence, and the grand jury present, the in-

dictment must abate if it appear that the department has made or is making an investigation into the same violation.

(*d*) The same result must ensue if the grand jury act on the knowledge of one of its members, if an investigation be started in the department.

6. The purpose of these provisions of the act does not require such a construction.

Their purpose is plain. The act defined new offenses, and it was apparent that prosecutions would be numerous. If it were no one's duty to enforce the act, prosecutions would be haphazard and ineffective, and no doubt largely at the instigation of rival manufacturers. The object of these provisions, then, was to provide for an intelligent, vigorous, and effective enforcement of the act.

But such provisions are by no means inconsistent with prosecutions through the ordinary channels of criminal procedure. The object of the statute is accomplished by prosecutions in either way.

It is uniformly held, in construing statutes imposing upon certain public officers the duty of their enforcement, that such duty is not exclusive, but proceedings for violations of the statute may be begun in the usual way.

Commonwealth v. *Carroll* (145 Mass. 403) was a complaint for throwing a stone at a street car. It was said by Mr. Justice Holmes "that anyone may make a complaint who is competent to make oath to it."

In *Commonwealth* v. *Murphy* (147 Mass. 577) motion to quash complaint for selling intoxicating liquor was made on the ground that complainant was not the mayor or one of the board of aldermen of the city. The court, in denying the motion, said:

> The provision of chapter 100, section 18, of the public statutes that " the mayor and aldermen of cities and the selectmen of towns shall prosecute to final judgment all violations of this section " was intended to impose a duty upon the officers named. It is directory only, and does not exclude the right of any other citizen to enter complaints for a violation of the law.

In *Commonwealth* v. *Mullen* (176 Mass. 132) the complaint was for having in possession oleomargarine in imitation of butter. The statute provided that inspectors of milk should make complaints for violation of the act. To an objection that the complaint was not made by such an officer, the court said, in an opinion by Holmes, C. J., " the short answer to the whole matter is that the statute does not prohibit any person not an inspector from making a complaint."

In *Isenhour* v. *State* (157 Ind. 517; 87 Am. St. Rep. 228) appellant moved to quash an affidavit charging him with having adulterated milk in his possession for sale because the prosecution was not begun by the State board of health, upon which the statute imposed the duty of enforcing the laws

governing food and drug adulterations. In denying the contention the court said:

> We can not believe that the general assembly, by imposing a special duty upon specified officers to enforce the statute, meant that individuals should be excluded from making complaint. The law is general, and has a general application. The interdictions prescribed by the act are for the public welfare, as much for one as for another, and it can not be assumed that the legislature by conferring a duty upon certain officers to enforce the law intended that its enforcement should depend wholly upon the pleasure or discretion of such officers. We see no reason for distinguishing this from other public offenses, in its general object and purpose, or why anyone entitled to the law's protection may not institute its enforcement, as he may, ordinarily, do in other cases. The evident intent was to confer upon the State board of health official duty, in addition to common individual right, to put the law in motion in proper cases.

To the same effect are:

> *Commonwealth* v. *Spencer,* 28 Pa. Super. Ct. 301.
>
> *Commonwealth* v. *Arow,* 32 *ib.* 1.
>
> *People* v. *Beaman,* 102 N. Y. App. Div. 155.

But even more analogous is *Commonwealth* v. *Bowers* (140 Mass. 483). This was a prosecution

for a violation of a pure-milk statute, chapter 57 of the Public Statutes of 1882, and the complaint simply alleged that the defendant had in his possession a quantity of adulterated milk. This was prohibited by section 5 of the chapter. Section 2 required inspectors, whose appointment was provided for by the act, to collect specimens of milk and to cause them to be analyzed and to preserve the result of the analysis as evidence, while section 10 made it the duty of every inspector to institute complaints for violations of the chapter on the information of any person who should lay before him satisfactory evidence by which to sustain a complaint. A motion to quash on the ground that the complaint did not allege the analysis and the facts disclosed was denied. On appeal the decision was affirmed, Field, J., for the Supreme Judicial Court, saying:

> The offense charged consists in the defendant's having in his possession, with intent to sell, milk which contained less than 13 per cent of milk solids. That this fact is shown by analysis is a matter of proof, but it is not a constituent element of the offense that there was an analysis, and it need not be alleged in the complaint. The motion to quash was rightly overruled.

An interesting case is *Attorney General* v. *Great Northern Railway Co.* (1 Drewry and Smale 154). This was an informaion by the attorney general to restrain the railway company from engaging in

commerce in coal. It was contended by the defendant that the act of 7 and 8 Victoria, chapter 85, sections 16 and 17, prescribed a particular remedy in such cases, namely, an investigation and report by a certain committee, and that the attorney general could not proceed otherwise than in accordance with that remedy and until an investigation had been had by said committee.

Section 17 of the act in question, in substance, provided:

> Whenever it shall appear to the lords of said committee [*i. e.*, the Board of Trade] that a railway company is acting in a manner unauthorized by the acts, or in excess of its powers, and that it would be for the public advantage that the company should be restrained from so acting, the lords of said committee shall certify the same to the attorney general, and thereupon the attorney general shall proceed by suit in equity to obtain an injunction or order (which the judge in equity or other judge to whom the application is made shall be required to grant if he shall be of the opinion that the act of the railway company complained of is not authorized by law) to restrain the company from so acting. (10 Chitty's Statutes, Railways, p. 29.)

Vice-Chancellor Kindersley, in overruling this contention, said:

> This objection, in truth, involves the contention that this court has no jurisdiction to

entertain the suit by the attorney general, unless it is instituted under the circumstances mentioned in those sections.

The effect of those sections is not to take away either the right of the attorney general to file such an information at his discretion, although there is no certificate of the board of trade, or the jurisdiction of the court to entertain such a suit. The only effect is, that if the board of trade has certified to the attorney general, he is *bound* to act and compel the railway company to abstain from doing that which is in violation of the law; in that particular case he can exercise no discretion, he must sue; and not only is the discretion of the attorney general taken away in that case, but if the judge finds that the acts are not authorized by the law, his discretion also is taken away, and he is bound to grant the injunction.

7. The departmental hearing is not necessary to the rights of the accused.

It may be conceded that none of the statutes construed in the state cases cited above contained a provision authorizing a hearing to the accused. But such provision does not confer upon him such right to a hearing as to invalidate a prosecution begun without it. If such right exists in one case, it should exist in all, but the right here is asserted in only a single instance.

What, then, is the object of the hearing? It can not be to give opportunity to persuade the depart-

ment that no crime has been committed, for the notice is not to be given until that fact appears.

Upon consideration of the language with reference to the person to be notified and heard, and the action to be taken as a result thereof, the object is apparent. The person notified is he " from whom the sample was obtained," and if it appears on the hearing that the act has been violated " by such party," the papers are to be sent to the district attorney for prosecution. The only question at the hearing is not whether the law has been violated, but whether the respondent is guilty of that violation.

In the execution of the act samples are to be taken largely from dealers, and the act in section 9 protects the dealer from prosecution if he has taken a guaranty from the manufacturer or wholesaler.

The object of the hearing is to protect the innocent dealer who furnishes evidence to fasten the crime upon the guilty person.

This right is not lost by the retailer even though he have no hearing. The production of the guaranty at the trial will insure his acquittal.

In the present case the sample was not obtained from the defendants; hence they were not entitled to notice or hearing. They can not therefore be heard to complain that the law was not obeyed. *Inter. Com. Com.* v. *Chicago, Rock I. & Pac. Ry.*, 218 U. S. 109.

Nor would a hearing before the Secretary have availed them. They are the manufacturers and could not have shifted the responsibility from themselves.

But even had their rights been invaded, it would not affect the prosecution, of which proposition the principle is similar to that of *Adams* v. *New York* (192 U. S. 585), where it was held that papers were admissible at the trial, if relevant to the issues involved, even though they had been illegally taken from the defendant's possession.

And the same is true of *Ker* v. *Illinois* (119 U. S. 436) and *Mahon* v. *Justice* (127 U. S. 700), where it was held the abduction of the defendant from the state of his asylum to that of trial did not defeat the jurisdiction of the courts of the latter state.

8. Such a construction if applied to libels under section 10 of the act would practically destroy the value of the act.

The remedy under that section is the destruction of the offending article itself. This remedy is independent of the criminal prosecutions prescribed in sections 1 and 2. *Hipolite Egg Co.* v. *United States,* 220 U. S. 55.

Under section 10 the article can be seized only while in interstate commerce or in original unbroken packages after delivery. If it is necessary before seizure to notify the owner of the charge and give him a hearing, the article will, of course,

be placed beyond reach before the conclusion of that hearing.

That such inquiry is not necessary in civil proceedings has been held by the courts in the following cases:

> *United States* v. *Fifty Barrels of Whiskey*, 165 Fed. 966 (Dist. Ct., D. Md., Judge Morris).
>
> *United States* v. *Sixty-five Casks of Liquid Extracts*, 170 Fed. 449 (Dist. Ct., N. D. W. Va., Judge Dayton, see 175 Fed. 1022, for this case on appeal).
>
> *United States* v. *Nine Barrels of Olives*, 179 Fed. 983 (Dist. Ct., E. D. Pa., Judge J. B. MacPherson).
>
> *United States* v. *One Hundred Barrels of Vinegar*, 188 Fed. 471 (Dist. Ct., D. Minn., Judge Willard).

The only case to the contrary is *United States* v. *Twenty Cases of Grape Juice*, decided May 8, 1911, by the Circuit Court of Appeals for the Second Circuit, not yet reported.

In the opinion in that case it is stated that when the preliminary hearing has been completed in the department the discretion of the district attorney is taken away, and he is compelled to prosecute upon the recommendation of the Secretary; in other words, his duty of determining that a case for prosecution exists is in that instance transferred to the Secretary.

Assuming this construction to be correct, it does not follow that when such investigation be started the district attorney and the grand jury are powerless to proceed until it is finished.

A more reasonable construction is that until such investigation be completed and the facts certified to the district attorney, the latter's discretion is not at an end; but if pending such investigaion it be desired to prosecute, the district attorney can not rely upon the Secretary's request, but must make his own investigation into the facts in the usual way.

Under this view the only effect of the statute is, then, to leave unimpaired the functions of the district attorney until the Secretary has acted, and then simply to compel him to prosecute irrespective of his own judgment in the matter.

CONCLUSION.

In conclusion it may be said that a reading of the act does not—simply as a matter of idiomatic English or of rhetorical composition—lead to the conclusion that Congress was grafting on the well-established system of criminal procedure of the common law as administered by the courts an entirely new method of prosecuting and convicting offenders. One simply gathers that a method was intended to be provided for obtaining in an orderly fashion information and evidence to execute an untried piece of legislation; that these sections

were merely meant to enable the executive officers of the Government to exercise in a well-advised manner their undoubted discretion as to whether they should prosecute cases under the act.

In other words, the machinery of the Department of Agriculture was to be invoked purely in an executive capacity and as an aid to the Department of Justice in the latter's function of prosecuting violations of the law.

Respectfully submitted.

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OCTOBER, 1911.

9

United States Supreme Court

In Error to United States Circuit Court for the Southern District of New York.

October Term, 1911—No. 463.

UNITED STATES,
Plaintiff-in-Error,
against
JOHN MORGAN and ALFRED Y. MORGAN,
Defendants-in-Error.

Brief for Defendants-in-Error.

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1911

Supreme Court of the United States

IN ERROR TO U. S. CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

October Term, 1910, No. ~~Sup.~~ 463

UNITED STATES,
Plaintiff-in-Error,

against

JOHN MORGAN and ALFRED Y. MORGAN,
Defendants-in-Error.

Brief for Defendants-in-Error.

The defendants-in-error were indicted in the U. S. Circuit Court for the Southern District of New York: it being charged against them that on the 21st day of October, 1908, at the Southern District of New York, and within the jurisdiction of the U. S. Circuit Court for that district, they *"did ship and deliver for shipment from the City of New York, State of New York, to the City of Newark, State of New Jersey, via Wells Fargo Express Co., consigned to W. R. Scudder, a certain article of food contained in a bottle labeled, among other things, as follows:*

'Imperial Spring Water,

JOHN MORGAN,

343 W. 39th Street,

New York.'

which said label on the bottle in which said food was shipped, regarding the substance or ingredients contained therein, was false and misleading, and labeled so as to deceive and mislead the purchaser, in that said label would indicate that the contents of said bottle was a spring water, whereas, in truth and fact, the contents of said bottle was not a spring water, but was filtered Croton water to which artificial mineral salts had been added" (Record, pp. 2, 3). The indictment was found a year and a half after the alleged offense.

The defendants pleaded not guilty. By permission of the Court the pleas were withdrawn, whereupon the defendants demurred to the indictment, and moved that it be quashed, upon substantially the same grounds that a motion in arrest of judgment was subsequently granted. The demurrers were overruled, and the motion to quash denied. The defendants thereupon renewed their pleas of not guilty (Record, p. 3).

The jury rendered a verdict as follows: *"That the label is misleading and the defendants are guilty."* Upon the coming in of the verdict the defendants moved for a new trial on the ground that the verdict was against the evidence and against law; and also upon the exceptions taken during the trial. Upon this the Court reserved decision. The defendants then further moved that judgment be arrested; upon which motion the Court also reserved decision (Record, p. 18).

Later the Court denied the motion for a new trial, on the ground that no conviction could be had under

the indictment (Record, p. 25), but granted the motion in arrest of judgment, on the ground that the indictment is insufficient (Record, p. 25). The grounds upon which these decisions were made appear in the opinion of the learned trial justice, mainly that the indictment should have alleged, and the evidence for the Government have established, that notice had been given to the defendants, with an opportunity to be heard, under Section 4 of the Food and Drugs Act, June 30, 1906 (Record, pp. 22, 24).

The cause is before this Court upon a writ of error issued out by the Government under Chap. 2546, U. S. Statutes at Large, 1907, Vol. 34, p. 1246; under which statute also the cause has been given a preference (Record, pp. 1, 2, 26, 27).

POINTS.

FIRST.

This Court has no jurisdiction to review the decision of the Court below.

(Act providing for writs of error in certain instances, etc., Chap. 2564, U. S. Statutes at Large, 1907, Vol. 34, p. 1246.)

I. No question was raised in the Court below as to the validity of the statute under which the indictment was found, nor was there any attempt to construe it, unless a comparison of the indictment with the statute can be held to be such. The Circuit Court contented itself with holding—among other things in that regard—that the indictment insufficiently set forth the crime intended to be defined and declared by the Pure Food Law Statute.

When the language of a statute is unambiguous there is nothing to construe; and such the Court below held in respect to the Pure Food Law.

II. That District Attorneys may, in the future as they have in the past, fail to set forth in indictments offenses as defined by statute, and all that goes to make up the offense, affords no reason for adding to the burdens of this Court; especially when under this act (of 1907) not only may writs of error be taken directly to this Court without the intervention of a Circuit Court of Appeals, but that *"such shall have precedence over all other causes."*

III. The fact too that to fully explain the conditions as they existed at the time of the granting or the motion in arrest of judgment the Court, in its opinion, deemed it necessary to refer to the testimony as it had been taken upon the trial presents mixed questions of fact and law, which is another reason why this Court should decline jurisdiction (Record, pp. 21, 22, 24). The trial Court holding that the taking of proof was necessary to ascertain whether the accusation came through the Department of Agriculture or from other sources (Record, p. 24).

SECOND.

If however it shall be held that the decision of the Court below involved a construction of the statute, then such construction as was given is in accordance with well established legal principles.

Section 4 of the Food and Drugs Act, provides for a hearing to be given to the parties from whom the samples are obtained before prosecution shall be instituted:

> United States v. 20 Cases of Grape Juice, Fed. Rep.

Section 4, Act of June 30, 1906, Chapter 3915, provides as follows:

> "That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, *for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained.* Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, *and if it appears that any of the provisions of this Act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States District Attorney*, with a copy of the results of the

analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the Court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid."

The following section provides as follows:

"5. That it shall be the duty of each District Attorney to whom the Secretary of Agriculture shall report any violation of this Act, or to whom any health or food or drug officer or agent of any State, Territory or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided."

Regulation 5 (Hearings, C.), provides, so far as it may, that even State officers and agents shall *"first submit"* samples to the Secretary of Agriculture before proceedings shall be instituted under this section.

Section 4 provides the procedure by which it shall be determined whether such articles are adulterated or misbranded within the meaning of the Act, and this section provides for a hearing preliminary to such determination and before the notice shall be given to the District Attorney upon which the subsequent proceedings are based. The chemical examination provided for is specifically said to be "for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act." The determination of this question is a condition precedent to criminal prosecution. The section goes on to say, "If it shall appear from any such examination that any of such specimens is adulterated or misbranded, within the mean-

ing of this Act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was obtained," *not* "shall cause notice to be given *in the event that a criminal prosecution is contemplated,*" as the Government contends, but notice shall be given whenever it appears from the chemical examination, that any specimen is adulterated or misbranded within the meaning of the Act. *"Any party so notified shall be given an opportunity to be heard under such rules and regulations as may be prescribed as aforesaid. * * * "*

The obvious purpose of such a hearing is to prevent injustice and abuse of the statute by business rivals of the manufacturer, who might otherwise, by laying complaint with the attendant publicity, ruin that competitor's business before he ever had his day in Court and an opportunity to disprove the charge. The Act can be and should be so construed as to prevent such results ~~without the hearing provided for~~.

This construction of the Act is strengthened by the fact that Section 11, applying to the examination of samples of imported foods and drugs, entitles the importer to notice and a hearing before the article is refused admission and destroyed.

The statute in providing for a preliminary hearing intended that both the dealer and the manufacturer should have an opportunity to be heard on these and similar questions and to show their good faith before the drastic measures are resorted to. While the statute provides only for notice to the persons of whom the sample was obtained, who would ordinarily be the dealers offering the article for sale, yet Congress knew that such notice would result practically in notice to the manufacturer, whom the dealer would immediately notify in order to protect himself from loss.

In a debate in the Senate, February 2, 1906 (Congressional Record, Vol. 40, Part 2, p. 1923), Senator

McCumber, one of the chief supporters of the bill, explained this provision as follows:

> "Mr. McCumber: It is not proposed that the Secretary of Agriculture shall in any way, shape, or manner, determine what the standards of food shall be. He is not to pass in any way upon the question whether any food or drug or condiment of any character shall enter into interstate commerce. He simply assists by examining such articles as he believes may fall within the prohibition of the Pure Food Law, if it becomes a law, and submits his statement to the District Attorney. *Even before submitting any question to the District Attorney, he gives notice to the manufacturer or the person interested in the sale of any product, and that person or manufacturer can appear before the Secretary of Agriculture and have a hearing upon the matter. If it shall develop that there is no cause for submitting the matter to the District Attorney, then, of course, it will not be submitted.*"

From this statement it is clear that Congress contemplated that the manufacturer and dealer should have an opportunity to be heard, before criminal proceedings were commenced against them. To use this great weapon against an apparently legitimate business, because of alleged noncompliance with a highly technical statute (some of whose requirements are impossible of literal fulfillment), upon the examination of a few samples, without affording the owners any opportunity to be heard, savors strongly of injustice and oppression. It is only too clear how easily such a power might be misused at the instigation of business rivals.

The courts have already had occasion to comment upon the fact that the usefulness of this Act is threatened by the unreasoning zeal sometimes shown in its enforcement.

U. S. vs. 650 Cases of Tomato Catsup, 166 Fed. Reporter, 773 at 775.

In re Wilson, 168 Federal Reporter, 566 at 568.

French Silver Dragee Co. vs. U. S., 170 Fed. Rep., 824.

"It was held in *United States vs. Fifty Barrels of Whiskey* (D. C.), 165 Fed., 966, and *United States vs. Sixty-five Cases of Liquid Extracts* (D. C.), 170 Fed., 449, and in some other unreported cases, that the provisions of Section 4 requiring notice of the examination of the goods by Federal officers to be given to the party from whom the samples have been taken, and an opportunity to be afforded such party to be heard as preliminary to suits *in personam* to recover penalties under Section 5. The eleventh section of the Act provides, in the case of imported goods, that samples shall be delivered to the Secretary of Agriculture, and that notice shall be given to the owner or consignee who may appear before the Secretary of Agriculture and give testimony, and 'if it appears from the examination of such samples, that any article of food or drug * * * is adulterated or misbranded,' the said article shall be refused admission, and the Secretary of the Treasury shall cause the destruction of such goods if not exported by the consignee within three months."

THIRD.

When an act, not before subject to punishment, is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued.

Wharton's Crim. Pleadings & Practice, 9th Ed., Sec. 230.
See cases.

Where an act is not in itself necessarily unlawful, but becomes so by its peculiar circumstances and relations, all matters must be set forth in which its illegality consists.

1 Wharton's Precedents, p. 23, and cases.
Com. v. Chase, 125 Mass., 202.

Special matter of the whole offense should be set forth in the indictment with such certainty that the offense may judicially appear to the court.

1 Wharton's Precedents, &c., Chap. II, notes, p. 22; Statement of offense.
U. S. v. Cruikshank, 92 U. S., 542.
U. S. v. Simmons, 96 U. S., 360.
People v. Taylor, 3 Denio, 91.

Where statute attaches to an offence certain technical predicates, these predicates must be used in the indictment.

The very rules governing statutory construction, as laid down by a recent English work of high standing, and abundantly sustained by the English authorities, also sustain the construction put upon this statute by the Court below. These are thus stated:

> "A penal statute is to be interpreted, like any other instrument, according to the fair common sense meaning of the language used.
>
> "Penal statutes should be construed strictly so that no cases shall be held to be reached by them but such as are within both the spirit and letter of such laws.
>
> "If there are two possible interpretations of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum.
>
> "If there is a reasonable interpretation which will avoid the penalty in any particular case, it must be adopted.
>
> "If the words are merely equally capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail."

Beal-Cardinal Rules of Legal Interpretation, 2nd Edition, 443, and cases.

The American rules and cases on the subject are not different.

The Federal decisions apply these rules to cases of this character, for various reasons.

In *Shaw vs. Railroad Company*, 101 U. S., 557, 565, the case was not a penal one but the question was whether a statute making bills of lading negotiable instruments by endorsement and delivery, had the effect of altering the common law and putting bills of lading in all respects on a common footing with negotiable instruments; and it was held that the statute did not put bills of lading on a common footing with negotiable instruments, because—"*No statute is to be construed as altering the common law farther than its words import.*"

In *Todd vs. U. S.*, 158 U. S., 278, 288, the question was whether an indictment for intimidating a witness from testifying before the United States Commissioner

charged a punishable offense, within the statute applicable to cases in "any Court of the United States" (Section 5406). The answer of the Court, by Brewer, J., was that a proceeding before a United States Commission was not a proceeding "in any Court of the United States," within the statute. The reason for that opinion is thus stated:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless *clearly within its terms*. 'There can be no constructive offenses, and before a man can be punished his case must be *plainly and unmistakably within the statute.*' *United States vs. Lacher*, 134 U. S., 624; Endlich on the Interpretation of Statutes, Sec. 329, 2nd Ed.; Pomeroy's Sedgwick on Statutory and Constitutional Construction, 280."

Some cases go even further yet in their statement of the rules. For instance, in *Harrison vs. Vose*, 9 How. (U. S.), 373, 378, the question was whether a penalty of $500 could be collected by the United States through Mr. Harrison, its Consul at Kingston, Jamaica, by a duly authorized action against Vose, master of a brig, under the statute making it

> "the duty of every master * * * on his arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport with the consul * * * that in case of refusal * * * to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul * * * for the benefit of the United States."

It appeared without dispute that the brig came to Kingston, Jamaica, and came to anchor about a quarter of a mile from the town, but did not go up to the town, or come to an entry, or discharge any cargo, or take

in cargo or passengers, nor did the master deposit his papers, or do any business except to communicate with consignees and learn that his cargo was to be delivered at Savannah, la Mar. Under such circumstances, the Court below was divided in opinion, and the case was certified to the United States Supreme Court. Woodbury, J., wrote the opinion, holding that the penalty could not be recovered. He said:

> "Of course, we must in this, as in all cases, begin the inquiry with the presumption that defendant is innocent, and that the burden of proof to make out the guilt devolves on the plaintiff. *In the construction of a penal statute it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent.* In the *United States vs. Shackford*, 5 Mason, 445, Justice Story says, 'It would be highly inconvenient, not to say unjust, to make every doubtful phrase a drag-net for penalties'" (p. 450).
>
> 1 Wharton's Precedents, p. 28.

See

> Wharton's Crim. Plead. &c., 9th Ed. Sec. 166.

FOURTH.

Other fatal defects appear in the indictment that may be stated as follows:

I. It charges that the water in question was contained in a bottle labeled, *"among other things,"* as follows: "Imperial Spring Water, John Morgan, 343 W. 39th St., New York."

Non constat but that the matters intended to be included in the phrase *"among other things"* had they

been set forth, would have furnished all the information necessary to make appear precisely what the defendants were charged with having shipped, and that their goods were not misbranded.

Pure Food Act, Sec. 5.
Last and next to last sub-divisions.

II. To have disclosed an offence the indictment should have charged that this water was shipped with intent that it be used *"as a food."*

For all that appears another and an entirely different use of it might have been intended, and that its use or consumption as a food was not contemplated.

III. If the goods were intended for export they were excepted from the operation of the Act, under certain conditions. The indictment should have negatived this.

Food and Drugs' Act, Proviso to Sec. 2.
Blacks Law Dic., 960.
2 Bouvier Law Dic., 483, "Proviso."
Minis v. U. S., 15 Pet., 421.
Rowell v. Janvrin, 151 N. Y., 60, 67.
Potter Dwarris, 118 to 120 and notes.
Voorhees v. Bank of U. S., 10 Peters, 471.
1 Kent Com., 463, note "a."
7 Waits Actions &c., 568, 569.
1 Chitt, Crim. Law, 284.
People v. Toynbee, 11 How. (N. Y.,) 333.
Spiers v. Parker, 1 Term. R., 141.
Food Act, Sec. 2.

IV. Introduction of and delivery in a State other than that of shipment of the adulterated or misbranded article is a necessary element to constitute the offence.

Food Act, Sec. 2.

The indictment limits its charge against the defendants to that they *"did ship and deliver for shipment"* to New Jersey.

There is no averment in the indictment that the article was thereafter introduced or delivered in the State of New Jersey.

Until such introduction or delivery there remained to the defendants a *locus poenitentiae*.

Until the border line of "the other State" shall have been passed there is no interstate commerce.

Coe v. Errol, (116 U. S., 517) is not in conflict with this. That cause involved a question of a right of taxation of certain personal property which was being transmitted from one State through a second to a third. That decision seems to have turned largely on what was conceded, or at least not questioned—that the property had been committed to a common carrier for transmission beyond the confines of the State of its production, great stress being laid upon the fact that the goods were in possession and under the control of this common carrier.

In the case at bar, while the indictment does charge that the defendants did ship and deliver for shipment, etc. via Wells Fargo Express Co.; it did not allege that this company was a common carrier, nor did this language imply other than that this company might have become but a single link in the chain of transportation or shipment; and that its duties ended when it had transmitted the goods to the border line between the two States (Record, p. 3).

V. It charges that the bottle was shipped and delivered for shipment from the State of New York to the State of New Jersey *"consigned to W. R. Scudder."*

It does not declare that Scudder was in the State of New Jersey nor that the bottle was delivered to him or even intended to be delivered to him in that State.

The Court will take judicial notice of the fact that several railroads have two or more termini in the State of New York, and that in passing from one to

another of these may go through the State of New Jersey to Niagara Falls or Buffalo, also in the State of New York.

A consignment to W. R. Scudder so shipped and taking such route delivered to him at Buffalo would not be a violation of this statute, and yet would be within the language of the indictment.

VI. It is also an essential element of the offence sought to be charged that the goods shall have been delivered *"in original, unbroken packages."*

Food and Drugs' Act, June 30, 1906, Sec 2 and 3.

Nothing of that kind is charged in this indictment.

VII. The use of the word *"Spring"* was not a misbranding within the meaning of the Act, especially when used in conjunction with the word *"Imperial."*

The Act under which defendants are sought to be held is popularly known as the "Pure Food Law." It is so endorsed on the Indictment. Its general purpose and intent is to protect the public from unwholesome foods and drugs.

There is no allegation that from the language of the brand anyone could be mislead into regarding it other than pure and wholesome water. The term *"Spring Water"* standing alone, and truthfully so describing the contents of a bottle, might often lead to most disastrous results, although technically and strictly true.

Spring water may be that which flows from any one of the millions of springs which dot the face of the earth. Many of these have distinctive medicinal qualities, and are variously used for the treatment of as many distinct and different human ailments. There are many such in the small Village of Saratoga, the waters of which have distinctive and often antagonistic chemical and medical properties. The services of an expert chemist would not be required to show that the

waters of a spring impregnated with alum should not be taken by a patient needing a cathartic. Yet each would be a spring water, and might bear no name indicating its peculiarities; but be known as "Congress," "Hathorn," "High Rock," "Excelsior" and the like.

Anyone, however, seeing a bottle bearing the legend *"Imperial Spring Water, John Morgan, 343 W. 39th Street, New York,"* would be advised at once where to inquire to ascertain the qualities of its contents, and would not be likely to buy it haphazard because of the use of the word *"Spring."*

Had the indictment charged that there is a spring known as the *"Imperial Spring,"* and that this water was not from such source another question might have been presented.

Pure Food Law, Sec. 8, Sub Div. First. "In the case of food."

FIFTH.

A full, fair and complete examination of the goods dealt in by the defendants-in-error, after they had had an opportunity to be heard, would have disclosed the fact that the Food and Drugs Act had not been violated.

Chap. 3915, Act of June 30, 1906, Sec. 4.

By such examination would have been made to appear:

(a) That not one bottle of Imperial Spring Water had been seen beyond the boundaries of the State of

New York until the samples in question were sent for and taken at the instance of the Government Inspectors, who by their excessive zeal in that regard are threatening the usefulness of this valuable Statute (Record, pp. 21, 22).

~~U. S. v. 650 Cases Tomato Catsup, 166 Fed. Rep., 773 to 775~~

In Re Wilson, 168 Fed. Rep., 566 to 568.

(b) That the defendants in error in sending the samples, did so indirectly at the request of the Government inspectors, who were authorized to make purchases of samples for the purposes of inspection.

Food and Drugs' Act, June 30, 1906, Sec. 3.
Rules and Regulations of Secretary of Treasury, Secretary of Agriculture and Secretary of Commerce and Labor, adopted October 17, 1906. Regulation 3.

(c) That the defendants in error were not even under suspicion of violating the law; hence there was no justification on the part of the Government in procuring samples of the goods of the defendants in error to be shipped beyond the confines of the State of New York, the purpose of the inspectors evidently being to entrap the defendants in error into the commission of a technical violation of the statute (Record, p. 21).

Speidan v. State, 3 Tex. App., 156; 30 Am. Rep., 126.
Johnson v. State, 3 Tex. App., 590.
Allen v. State, 40 Ala., 399; 91 Am. Pac., 476.

Nor is this contrary to the dictum of Treat, J., in *United States v. Whittier*, (7 Cent. L. J., 51) for there it was proved that the defendant had been an offender in the past, and it was held that the violation of the law by one person, in order to detect a proved

offender, was no excuse for the latter, nor could it be made available by him as a defense.

To the same effect see:

Dodge v. Brittain, Meigs., 84.
Sanders v. State (Tenn.), 30 Am. Rep., 130 note.
Bell v. State (Tex. Crim. App.), 56 S. W., 913.

(d) That the goods were in every respect proper for human food and in no way deleterious, or detrimental to health (Record, p. 22).

French &c. Co. v. U. S., 179 Fed. Rep., 824.

SIXTH.

The consequences to the defendants-in-error, should the conviction be sustained, means very much more than the payment of a fine for this first—one—and only offense; if it shall be held to be such.

I. One who has established a well known business, which he has conducted without criticism for over half a century, is ordinarily not willing to stand branded as a violator of the law, even though the offence charged be a venial one.

II. Under the Pure Food Law, Sec. 4, "After judgment of the court notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid;" that is to say, the rules and regulations to be established and declared under Section 3 by the Secretary of the Treasury, Secretary of Agriculture and Secretary of Commerce & Labor.

By Regulation 6, b "This publication may be made in the form of circulars, notices or bulletins, as the Secretary of Agriculture may direct, not less than thirty days after judgment;" and this notwithstanding a pending appeal.

The effect of this might well be that, at the instance of a rival, a business of a lifetime which, as it had been conducted had violated no principle of the common law, but made by this statute a penal offence, is declared by publications spread broadcast throughout the land under the sanction of the Government as in violation of law. And thus the innocent use of the word *"Spring"* would have the same effect upon the popular mind as the condemnation of an article of commerce adjudged to contain poisonous ingredients.

SEVENTH.

The order of the Circuit Court in arrest of judgment should be affirmed.

Dated, October , 1911.

ALEXANDER THAIN,
Of Counsel for Defendants in Error.

UNITED STATES *v.* MORGAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 463. Argued October 19, 1911.—Decided December 11, 1911.

It is not a condition precedent to prosecutions for violation of the Pure Food and Drug Act that an investigation or hearing be had in the Department of Agriculture.

Where a statute provides for notice in one case and permits prosecutions without notice in another case it shows that there was no intent to make notice jurisdictional.

Repeals by implication are not favored; nor is there a presumption that a law passed in the interest of public health was intended to hamper prosecutions of offenses against the statute itself.

A statute will not be construed as grafting exceptions on the criminal law in favor of offenders against that particular statute in the absence of clear and unambiguous expressions.

Citizens are furnished the surest safeguards against malicious prosecutions by the Fourth Amendment.

Section 4 of the Pure Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 678, does not repeal Rev. Stat., §§ 771 or 1022, making it the duty of the district attorney to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, nor does it limit him to prosecute only those offenders who have had a hearing before the Department of Agriculture.

THE defendants maintained an establishment in New York where, after filtering Croton water drawn from the city pipes, adding mineral salts and charging it with carbonic acid, the water was bottled and sold as "Imperial Spring Water." In October, 1908, a food and drug inspector applied to a druggist in Newark, New Jersey, for several bottles of this water. The druggist, not having them in stock, ordered them from the defendants, who shipped them from New York to the druggist in Newark. He delivered them to the inspector, who paid therefor.

The judge, in his opinion, treats the prosecution as having been instituted by the inspector, though this does not affirmatively appear in the record, and the defendants were not indicted until April, 1910, when they were found guilty of shipping misbranded goods in interstate commerce. They moved in arrest of judgment on the ground that it was not alleged that they had been given notice and a preliminary hearing by the Department of Agriculture, contending this was a condition precedent to the return of a valid indictment. The judge held that such hearing must be granted in all cases where the prosecution was instituted by the Department of Agriculture or its agent (181 Fed. Rep. 587), and from a later order sustaining the motion in arrest the Government brought the case here under the Criminal Appeals Act.

The Solicitor General, with whom *Mr. Jesse C. Adkins* and *Mr. Loring C. Christie* were on the brief, for the United States:

In no case is it a condition precedent to prosecution for a violation of the Pure Food and Drugs Act that an investigation or hearing be had in the Department of Agriculture.

The Federal grand jury possesses full inquisitorial power and may indict upon knowledge acquired either from their own observations or upon the evidence of witnesses called

of their own motion before them, and even though no preliminary hearing be had before a committing magistrate. *Hale* v. *Henkel*, 201 U. S. 43.

The departmental investigation and hearing do not constitute a means of defining any element of the crimes. They are defined by §§ 1 and 2 of the act. The offense was putting a misbranded article of food into interstate commerce, and the crime was committed when the shipment was made. The manner of acquiring the evidence can make no change in the crime.

Uniformity of procedure does not require the construction contended for. Such preliminary hearing is not intended as an aid to the court.

The lawfulness of the manufacturer's label depends only on its truth, not on any action of the Secretary of Agriculture. The latter cannot make pure what is adulterated, nor make true what is false. Nor does the Secretary's finding *prima facie* establish the defendant's guilt. Such construction would be prejudicial to the accused and an invasion of his rights.

If the departmental findings are not received in evidence they should not be averred in the indictment.

The provisions for investigation by the Department are not inconsistent with prosecutions through the ordinary channels or criminal procedure. The object of the statute is accomplished by prosecutions in either way.

In construing statutes imposing upon certain public officers the duty of their enforcement, such duty is not exclusive, but proceedings for violations of the statute may be begun in the usual way. *Commonwealth* v. *Carroll*, 145 Massachusetts, 403; *Commonwealth* v. *Murphy*, 147 Massachusetts, 577; *Commonwealth* v. *Mullen*, 176 Massachusetts, 132; *Isenhour* v. *State*, 157 Indiana, 517; *Commonwealth* v. *Spencer*, 28 Pa. St. 301; *Commonwealth* v. *Arrow*, 32 *Ib.* 1; *People* v. *Beaman*, 102 N. Y. App.

Div. 155; *Attorney General* v. *Great Northern Railway Co.*, 1 Dewry and Smale, 154.

The departmental hearing is not necessary to the rights of the accused. The object of the hearing is to protect the innocent dealer who furnishes evidence to fasten the crime upon the guilty person. This right is not lost by the retailer even though he may have no hearing. The production of the guaranty at the trial will insure his acquittal.

In the present case the sample was not obtained from the defendants; hence they were not entitled to notice or hearing. *Inter. Com. Com.* v. *Chicago, Rock I. & Pac. Ry. Co.*, 218 U. S. 109.

The construction contended for if applied to libels under § 10 of the act would practically destroy the value of the act.

The remedy under that section is the destruction of the offending article itself. This remedy is independent of the criminal prosecutions prescribed in §§ 1 and 2. *Hipolite Egg Co.* v. *United States*, 220 U. S. 55.

That such inquiry is not necessary in civil proceedings has been held by the courts in the following cases: *United States* v. *Fifty Barrels of Whiskey*, 165 Fed. Rep. 966; *United States* v. *Sixty-five Casks of Liquid Extracts*, 170 Fed. Rep. 449; *United States* v. *Nine Barrels of Olives*, 179 Fed. Rep. 983; *United States* v. *One Hundred Barrels of Vinegar*, 188 Fed. Rep. 471. *United States* v. *Twenty Cases of Grape Juice*, decided May 8, 1911, 189 Fed. Rep. 331, can be distinguished from this case.

Mr. Alexander Thain for defendants in error:

This court has no jurisdiction to review the decision of the court below.

The construction given to the statute by the court below is in accordance with well-established legal principles.

The obvious purpose in providing a hearing was to prevent injustice and abuse of the statute by business rivals of the manufacturer, who might otherwise, by laying complaint with the attendant publicity, ruin that competitor's business before he ever had his day in court and an opportunity to disprove the charge. The act can be and should be so construed as to prevent such results.

The statute in providing for a preliminary hearing intended that both the dealer and the manufacturer should have an opportunity to be heard on these and similar questions and to show their good faith before the drastic measures are resorted to. See debate in the Senate February 2, 1906 (Congressional Record, Vol. 40, Part 2, p. 1923), from which it is clear that Congress contemplated that the manufacturer and dealer should have an opportunity to be heard before criminal proceedings were commenced against them.

The courts have already had occasion to comment upon the fact that the usefulness of this act is threatened by the unreasoning zeal sometimes shown in its enforcement. *In re Wilson*, 168 Fed. Rep. 566 at 568; *French Silver Dragee Co.* v. *United States*, 179 Fed. Rep. 824.

When an act, not before subject to punishment, is declared penal, and a mode is pointed out in which it is to be prosecuted, that mode must be strictly pursued. Wharton's Crim. Pleading & Practice, 9th ed., § 230; 1 Wharton's Precedents, p. 23, and cases; *Commonwealth* v. *Chase*, 125 Massachusetts, 202.

Special matter of the whole offense should be set forth in the indictment with such certainty that the offense may judicially appear to the court. 1 Wharton's Precedents &c., Ch. II, notes, p. 22. *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Simmons*, 96 U. S. 360; *People* v. *Taylor*, 3 Denio, 91.

Where a statute attaches to a named offense certain technical predicates, these predicates must be used in the

indictment. Beal, Cardinal Rules of Legal Interpretation, 2d ed., 443, and cases.

The American rules and cases on the subject are not different. *Shaw* v. *Railroad Company*, 101 U. S. 557, 565; *Todd* v. *United States*, 158 U. S. 278, 288; *Harrison* v. *Vose*, 9 How. 373, 378; 1 Wharton's Precedents, p. 28; Wharton's Crim. Plead. &c., 9th ed., § 166.

Other fatal defects appear in the indictment.

MR. JUSTICE LAMAR after making the foregoing statement, delivered the opinion of the court.

The Federal courts have not agreed as to the effect of the provision for notice and hearing found in § 4 of the Pure Food and Drug Act of June 30, 1906, 34 Stat. L. 768, c. 3915. *United States* v. *Barrels Olives*, 179 Fed. Rep. 983. *United States* v. *Cases of Grape Juice*, 189 Fed. Rep. 331. Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act.

Under the Pure Food Law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But, even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the "party from whom the sample was obtained" might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (§ 9) is made "amenable to the prosecutions, fines and other penalties."

The act, therefore, declares (§ 4) that when, on such examination by the Board of Chemistry, the article is found to be adulterated, "notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard." If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact, together with a copy of the analysis, to the proper district attorney, who (§ 5), *without delay*, must "institute appropriate proceedings," by indictment, or libel for condemnation, or both, as the facts may warrant.

But the act also contemplates (§ 5), that complaints may be made to the district attorney by state health officials. In that class of cases, no doubt because the state agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such state officers "shall present satisfactory evidence of such violation." But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard.

In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except "to the party from whom the sample was obtained." And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury.

In cases like the present, or where foreign goods are labelled as of domestic manufacture and vice versa, no scientific examination may be necessary. But usually a chemical analysis will be required to determine whether an article is adulterated. The Bureau of Chemistry is

equipped to do that work, so that in practice most prosecutions will be based on reports made by the Department of Agriculture after notice. But the hearing is not judicial. There is no provision for compelling the presence of the party from whom the sample was received; if he voluntarily attends he is not in jeopardy; an adverse finding is not binding against him; and a decision in his favor is not an acquittal which prevents a subsequent hearing before the Department, or a trial in court.

The provision as to the hearing is administrative, creating a condition where the district attorney is compelled to prosecute without delay. When he receives the Secretary's report, he is not to make another and independent examination, but is bound to accept the finding of the Department that the goods are adulterated or misbranded, and that the party from whom they had been obtained held no guaranty. But the fact that the statute compels him to act in one case, does not deprive him of the power voluntarily to proceed in that and every other case under his general powers. If, for any reason, the executive department failed to report violations of this law its neglect would leave untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States." Rev. Stats., §§ 771, 1022. So, an improper finding by the Department would no more stay the grand jury than an order of discharge by a committing magistrate after an ordinary preliminary trial. For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury, who are diligently to inquire and true presentment make of all matters called to their attention by the court, or that may come to their knowledge during the then present service.

Repeals by implication are not favored, and there is certainly no presumption that a law passed in the inter-

est of the public health was to hamper district attorneys, curtail the powers of grand juries or make them, with evidence in hand, halt in their investigation and await the action of the Department. To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.

It was argued that the privilege of a preliminary hearing was granted so as to prevent malicious prosecutions. But, had such been its intention, the statute would have required that a hearing should be given to all persons charged with a violation of the act, and not merely to those from whom the sample was received. A further answer is, that as to this and every other offense the Fourth Amendment furnishes the citizen the nearest practicable safeguard against malicious accusations. He cannot be tried on an Information unless it is supported by the oath of some one having knowledge of facts showing the existence of probable cause. Nor can an indictment be found until after an examination of witnesses, under oath, by grand jurors,—the chosen instruments of the law to protect the citizen against unfounded prosecutions, whether they be instituted by the Government or prompted by private malice. There is nothing in the nature of the offense under the Pure Food Law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime. The judgment is

Reversed.